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No. 83-1605

In the Supreme Court of the United States

OCTOBER TERM, 1983

RALPH DEWAYNE FRANKS AND
KATHRENA JUNE FRANKS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' failure to report their foreign bank accounts fully and accurately on their federal income tax returns violated 26 U.S.C. 7206(1).

2. Whether petitioners were unfairly prejudiced by being tried at one trial on charges of attempted tax evasion and filing false tax returns.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Radzanower v. *Touche Ross & Co.*, 426 U.S. 148 4

United States v. *Bishop*, 412 U.S. 346 7

United States v. *Damon*, 676 F.2d 1060 5

United States v. *Granda*, 565 F.2d 922 ..... 6, 7

United States v. *Hajecate*, 683 F.2d 894, cert. denied, No. 82-1266 (May 16, 1983) 5

United States v. *Holroyd*, No. 83-1451 (2d Cir. Apr. 18, 1984) 5

United States v. *Levy*, 533 F.2d 969 ..... 5, 6

United States v. *Lovasco*, 431 U.S. 783 7

United States v. *Taylor*, 574 F.2d 232, cert. denied, 439 U.S. 893 5

United States v. *Yuginovich*, 256 U.S. 450 4

Page

Statutes and regulation:

Currency and Foreign Transactions Reporting Act, 31 U.S.C. (1976 ed.) 1051 *et seq.* 3

§ 209, 31 U.S.C. 1058 3

§ 210, 31 U.S.C. 1059 3

§ 241, 31 U.S.C. 1121 6

Internal Revenue Code of 1954 (26 U.S.C.):

§ 7201 ..... 2, 7

§ 7206(1) 2, 4, 5, 6, 7

31 U.S.C. 5322 3

31 C.F.R. 103.24 (1975) 6

Miscellaneous:

H.R. Rep. 91-975, 91st Cong., 2d Sess. (1970) 4-5

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 723 F.2d 1482.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1983. A petition for rehearing was denied on January 18, 1984. The petition for a writ of certiorari was filed on (Monday) March 19, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, husband and wife, were tried on charges set forth in an amended five-count indictment. Counts I, II, and V of the indictment charged violations of Section 7206(1) of the Internal Revenue Code of 1954 (26 U.S.C.): Count I charged that petitioners filed a false federal income

tax return (Form 1040) for the year 1974 in that it did not acknowledge or report eight foreign bank accounts in which petitioners had an interest and over which they had signatory authority; Count II charged that petitioners filed a false federal income tax return (Form 1040) for the year 1975 in that it did not acknowledge or report at least two foreign bank accounts; and Count V charged that petitioners filed a false amended federal income tax return (Form 1040X) for the year 1974 in that it did not acknowledge or report four foreign bank accounts. Counts III and IV of the indictment charged that petitioners willfully attempted to evade their income taxes for 1974 and 1975 by filing false and fraudulent income tax returns that substantially understated their taxable income and tax liabilities for those years, in violation of 26 U.S.C. 7201. Pet. App. A2-A4.

Before trial, petitioners objected to the joinder of charges against them under both 26 U.S.C. 7201 and 7206(1) and moved for an order compelling the government to elect to prosecute under one statute or the other. The district court denied the motion. Pet. App. A8-A9. Petitioners also moved to strike all portions of the indictment relating to their foreign bank accounts, on the ground that their failure to report such accounts on their tax returns could not, as a matter of law, constitute a violation of 26 U.S.C. 7206(1). The district court also denied this motion. Pet. App. A6.

Following a jury trial, petitioners were convicted on all five counts of the indictment. Petitioners were each sentenced to concurrent terms of 18 months' imprisonment and fined $10,000 on Counts III and IV. Petitioners were given suspended sentences on Counts I, II, and V and placed on probation for three years. They were also fined $5,000 on each count. The probation was conditioned on the payment of $100,000 as restitution for unpaid taxes. Pet. App. A4-A5. The court of appeals affirmed the convictions, although

it vacated that portion of the judgment requiring restitution as a special condition of probation (Pet. App. A1-A13).

2. The evidence showed that, during 1974 and 1975, petitioners were the owners and were actively involved in the operation of numerous domestic and foreign businesses and had an interest in or signatory authority over at least eight foreign bank accounts, with total net deposits of $3,770,723 in 1974 and $1,666,724 in 1975 (Pet. App. A5-A6). Petitioners filed a 1974 federal income tax return (Form 1040) on which they indicated that they had no foreign bank accounts (*id.* at A7). Subsequently, petitioners filed an amended 1974 return (Form 1040X) on which they indicated they had foreign accounts; however, the Form 4683 petitioners appended to that filing reported only some of their foreign accounts (*ibid.*). Petitioners later filed a 1975 Form 1040, with appended Form 4683, on which they again failed to report several of their foreign bank accounts (Pet. App. A8).

ARGUMENT

1. Petitioners' primary contention (Pet. 5-10) is that Congress did not intend that violations of foreign currency and account reporting requirements be prosecuted under the penal provisions of the Internal Revenue Code of 1954 (26 U.S.C.). This contention is without merit.

a. Petitioners first suggest that Congress' enactment of the Currency and Foreign Transactions Reporting Act (the Act), 31 U.S.C. (1976 ed.) 1051 *et seq.*, excised violations of foreign account reporting requirements from the coverage of the penal provisions of Title 26. Petitioners refer specifically to Sections 209 and 210 of the Act, 31 U.S.C. (1976 ed.) 1058 and 1059,[1] which provide misdemeanor sanctions

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[1]In 1982, these provisions were amended, and the new version is now codified at 31 U.S.C. 5322.

for willful violations of the Act and regulations promulgated thereunder, and felony sanctions for certain aggravated violations. See Pet. App. A16. Essentially, this contention is that the Act repealed by implication a portion of Title 26. But it is well settled that repeals by implication are not favored. Such a repeal generally will be found only where the provisions of a later act are repugnant to the provisions of an earlier act or where the later act covers the whole subject of the earlier act and apparently was intended as a substitute for the earlier act. See, *e.g.*, *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *United States* v. *Yuginovich*, 256 U.S. 450, 463 (1921). The provisons of the Act, which impose reporting requirements on international currency transportation and certain domestic and foreign financial transactions, and provide penalties for violations of those requirements, plainly are neither repugnant to, nor intended as a substitute for, the provisions of 26 U.S.C. 7206(1). Nor can it be said that the applicability of Section 7206(1) makes the penal provisions of the Act a nullity. The Act's penalties apply to violations of any of the reporting requirements set forth there (see H.R. Rep. 91-975, 91st Cong., 2d Sess. 20 (1970)), while Section 7206(1) applies only to false and fraudulent reporting on federal income tax returns and statements.[2]

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[2]Indeed, the legislative history of the Act clearly suggests that the penal provisions of the Act were not intended as a substitute for Section 7206(1). The House Report states:

> The initial implementation of this chapter [relating to foreign financial transactions] may very possibly be limited to a requirement that those under a duty to file Federal income tax returns include in the return information as to the existence of any relationship which the taxpayer has with a foreign financial agency.

H.R. Rep. 91-975, *supra*, at 23. Thus, Congress was clearly aware that, at least for a while, foreign accounts would be reported on Federal income tax returns. Therefore, it surely would have expressly exempted foreign account reporting from the proscriptions of Section 7206(1) if such were its intent.

b. Relying on *United States* v. *Levy*, 533 F.2d 969, 973 (5th Cir. 1976), petitioners contend that their failure to report their foreign bank accounts fully and accurately on their 1974 and 1975 tax returns could not constitute a violation of Section 7206(1) because foreign accounts were not required to be reported on tax returns by the Internal Revenue Code or by the regulations promulgated thereunder.

This argument was fully considered and correctly rejected by the court of appeals (Pet. App. A6-A8). As the court explained, *Levy* has no applicability here because the Fifth Circuit was there concerned only with the question whether a separate financial statement (Form 433-AB) was covered by Section 7206(1) as a "statement." The court held that Congress did not intend the statute to apply to a filing independent of a tax return that is not required by statute or regulation. In subsequent cases, however, the Fifth Circuit has unequivocally held that the rule set forth in *Levy* does not apply to information furnished with tax returns. *United States* v. *Damon*, 676 F.2d 1060, 1063-1064 (1982); *United States* v. *Taylor*, 574 F.2d 232, 237, cert. denied, 439 U.S. 893 (1978). See also *United States* v. *Hajecate*, 683 F.2d 894, 901 (5th Cir. 1982), cert. denied, No. 82-1266 (May 16, 1983). These decisions, which petitioners do not address, clearly establish that the decision below is fully consistent with *Levy*.[3]

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[3]The Second Circuit has recently rejected even the limited restriction placed on Section 7206(1) by *Levy* itself. See *United States* v. *Holroyd*, No. 83-1451 (Apr. 18, 1984). The conflict between *Levy* and *Holroyd*, however, is not presented here.

Moreover, the rationale underlying *Levy* has no application here. In *Levy*, the Fifth Circuit emphasized that, since Section 7206(1) is a perjury statute, it is necessary that the Internal Revenue Service have authority to take the statement upon which a prosecution is based, and the court held that that authority must be expressly provided by statute or regulation. In the instant case, by contrast, there can be no doubt that the Secretary of the Treasury and the Internal Revenue Service had statutory and regulatory authority to take petitioners' statements relating to foreign bank accounts. These statements were expressly required by statute, 31 U.S.C. (1976 ed.) 1121. Congress explicitly stated that the statute was intended to provide the Secretary of the Treasury with clear legal authority to impose a foreign account reporting requirement upon taxpayers filing federal income tax returns. H.R. Rep. 91-975, *supra*, at 23-24. Moreover, a Treasury regulation in effect when petitioners filed their 1974 and 1975 returns, albeit one not promulgated under the Internal Revenue Code, expressly required them to report their foreign accounts on their returns. 31 C.F.R. 103.24 (1975).

c. Petitioners also argue (Pet. 8-10) that their false reports here cannot be prosecuted under Section 7206(1) because the standard of proof and scienter requirements under that statute are more relaxed than those applicable to the penal provisions of the Currency and Foreign Transactions Reporting Act. Relying on *United States* v. *Granda*, 565 F.2d 922 (5th Cir. 1978), which involved a prosecution under the Act for failing to report the transportation into the country of more than $5,000, petitioners contend that it was incorrect and unfair to permit their conviction without an instruction that, in order to convict, the jury must find that they willfully violated a known legal duty to report their foreign bank accounts fully and accurately. This contention is without merit for several reasons.

Preliminarily, we note that this contention was not raised in the court of appeals, and it is not appropriate for this Court to consider it in the first instance. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, it is not apparent that there is any significant difference between the standard of proof and scienter required by *Granda* for prosecutions under the Act and those applied in tax prosecutions. Under Section 7206(1), a defendant must be shown to have acted in "voluntary, intentional violation of a known legal duty." *United States* v. *Bishop*, 412 U.S. 346, 360 (1973). Consistent with this requirement, the jury in this case was instructed that specific intent was required here, meaning that "the Government must prove that the defendants knowingly did an act which the law forbids or knowingly failed to do an act which the law requires, purposely intending to violate the law" (Tr. 1938).[4] To the extent that there may be some difference between the scienter requirements under the two statutes, there is no reason why Congress cannot draw such a distinction between two different statutory violations, and certainly Congress's choice to proceed in this fashion does not violate due process.

2. Petitioners contend (Pet. 10-14) that they were prejudiced in various ways by the fact that they were tried in one proceeding on charges under both 26 U.S.C. 7201 and 7206(1). These contentions are without merit.

Petitioners' assertion (Pet. 10-11) that this joinder resulted in an impermissible pyramiding of penalties was correctly rejected by the court of appeals (Pet. App.

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[4]The conviction in *Granda* was reversed because there was no evidence that the currency reporting requirement was known to the defendant. See 565 F.2d at 926. Here, by contrast, the tax returns filed by petitioners unequivocally put them on notice that they were required to report whether they exercised any control over foreign bank accounts.

A9-A11). As the court explained, under the facts of this case, the false return counts were not lesser included offenses of the attempted tax evasion counts because the charge of misrepresenting foreign bank account information is "distinct and independent from an understatement of gross income" (*id.* at A11).

Similarly, there is no basis for petitioners' assertion (Pet. 11) that their credibility as witnesses on the tax evasion charge was unfairly compromised by the fact that they were also charged with failing to report their foreign accounts. And, finally, petitioners' assertion (Pet. 11-13) that they were prejudiced by possible confusion regarding the introduction of evidence of their deposits in a Bermuda account was also correctly rejected by the court of appeals (Pet. App. A12-A13). Evidence relating to petitioners' total gross deposits into their foreign accounts was admissible in order to show that their failure fully and accurately to report those accounts was willful, and that evidence did not unfairly prejudice their defense to the tax evasion charges.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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